

REPRESENTATIVES FOR PETITIONER: Jennifer J. Abrell, Attorney
Dennis, Wenger & Abrell, P.C.

Roger L. Doctor, CPA
Estep * Doctor & Company, PC

REPRESENTATIVE FOR RESPONDENT: none

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

AL PETE MEATS, INC.)	Review of the Claim for Enterprise
)	Zone Personal Property Tax Credit
Petitioner)	
)	Petition No. 18-001-98-4-0-01043
v.)	
)	County: Delaware
DELAWARE COUNTY AUDITOR)	Township: Center
)	
Respondent)	Assessment Year: 1998
)	

On Appeal from the Delaware County Auditor

FINAL DETERMINATION

The Indiana Board of Tax Review assumed jurisdiction of this matter as the successor entity to the State Board of Tax Commissioners, and the Appeals Division of the State Board of Tax Commissioners. For convenience of reference, each entity is without distinction hereafter referred to as the "Board".

The Board having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

Findings of Fact and Conclusions of Law

Issue

Whether Al Pete Meats, Inc. (Al Pete) is entitled to an Enterprise Zone Business Personal Property Tax Credit (EZ Credit) for the 1998 assessment year.

Findings of Fact and Other Matters of Record

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law made herein shall also be considered a finding of fact.
2. Pursuant to Ind. Code § 6-1.1-20.8-3(b), Mr. John W. Hartmeyer, President of Al Pete, on behalf of Al Pete, filed a written request for review of the Claim for Enterprise Zone Business Personal Property Tax Credit (Form EZ-1) by the Board. The request was filed August 14, 1998. The request for review is labeled Board Exhibit A.
3. The subject property is located at 2100 East Willard, Muncie, Indiana 47302, Center Township, Delaware County.
4. In 1998, May 15 was a Friday and May 18 was a Monday.

Enterprise Zone Business Personal Property Tax Credit

5. In accordance with case law, the Board may consider a late-filed application for the Enterprise Zone Business Personal Property Tax Credit. *Graybar Electric Co. v. State Board of Tax Commissioners*, 723 N.E. 2d 491 (Ind. Tax 2000). The Tax Court in *Graybar* references *State Board of Tax Commissioners of Indiana v. New Energy Company of Indiana*, 585 N.E. 2d 38 (Ind. App. 1992). As a result

of *New Energy*, the Board considers the totality of the facts and circumstances in determining whether or not to approve a late-filed deduction application (see 50 IAC 10-4-2).

6. The Board has adopted seven (7) factors to guide the exercise of its discretion in determining whether to grant late-filed applications. 50 IAC 10-4-2 (b).
7. On November 30, 2001, the Board sent a letter to Al Pete giving them the opportunity to address the seven (7) factors. The Board's letter is labeled as Board Exhibit B.
8. Neither the Petitioner nor his representative contacted the Board prior to the December 31, 2001 deadline outlined by the Board's November 30, 2001 letter.
9. The Board verified its letter was mailed, with proof of mailing, and also verified that the letter was not returned to the Board as not deliverable.
10. On April 15, 2002, the Board issued to Al Pete an Order of Dismissal with attached Findings of Fact and Conclusions of Law as a result of Al Pete's failure to respond. The Order of Dismissal allowed Veil to submit to the Board within ten (10) days a written objection requesting the Order be vacated and set aside. The Order of Dismissal with attached Findings of Fact and Conclusions of Law have been labeled as Board Exhibit C.
11. By letter dated April 23, 2002, Mr. Roger Doctor, CPA, Estep *Doctor & Company, PC, and Mr. John Hartmeyer, President of Al Pete, requested the Order of Dismissal be set aside and additional time to file supporting documentation on the seven (7) factors outlined in 50 IAC 10-4-2. Messrs. Roger and Hartmeyer's letter has been labeled as Board Exhibit D.

12. By letter dated May 23, 2002, the Board set aside the Order of Dismissal issued April 15, 2002. The Board granted Al Pete an additional thirty (30) days to address the seven (7) factors outlined in 50 IAC 10-4-2. (*Graybar Electric Co. v. State Board of Tax Commissioner's* 723 N.E. 2d 491 (Ind. Tax 2000)). The Board's letter has been labeled as Board Exhibit E.

13. On June 21, 2002, Ms. Jennifer Abrell, Attorney, Dennis, Wenger & Abrell, P.C., submitted a written response with attachments. The attachments include a power of attorney from Veil Foods Inc. to Jennifer Abrell and Roger Doctor; a power of attorney from Al Pete Meats, Inc. to Jennifer Abrell and Roger Doctor; a letter from Muncie Urban Enterprise Association Inc. to the Board, dated June 21, 2002; an affidavit for Veil Foods Inc. and Al Pete Meats, Inc. from John W. Hartmeyer, June 21, 2002; a copy of the request for review of the Form EZ-1, dated August 13, 1998; a letter from the Delaware County Auditor to Al Pete Meats, Inc., dated August 7, 1998; a letter from the Delaware County Auditor to Veil Foods Inc., dated August 7, 1998; a copy of Al Pete Meats, Inc. Form EZ-1; a copy of Veil Food Inc. Form EZ-1; a copy of Al Pete Meats, Inc. Form 103 Business Tangible Personal Property Assessment Return; and a copy of Veil's Form 103 Business Tangible Personal Property Assessment Return. Ms. Abrell's letter with attachments has been labeled Board Exhibit F.

Conclusions of Law

1. Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every designated administrative step of the review process be completed. *State v. Sproles*, 672 N.E. 2d 1353 (Ind. 1996); *County Board of Review of Assessments for Lake County v. Kranz* (1964), 224 Ind. 358, 66 N.E. 2d 896. Regarding the filing of a Form EZ-1, the levels of review are clearly outlined by statute. First, the form EZ-1 is filed with the County and acted upon by the County Auditor. Ind. Code § 6-1.1-20.8. If the taxpayer

disagrees with the County Auditor's action on the Form EZ-1, then a written request for review may be filed with the Board. Ind. Code § 6-1.1-20.8-3 (b).

2. The Board is the proper body to hear an appeal of the action of the County Auditor pursuant to Ind. Code § 6-1.1-20.8-3 (c).

Burden

3. It is fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128.
4. The taxpayer is required to meet his burden of proof at the Board administrative level for two reasons. First, the Board is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the Board in the untenable position of making the taxpayer's case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.
5. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence "sufficient to establish a given fact and which if not contradicted will remain sufficient." *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).

Enterprise Zone Business Personal Property Tax Credit

6. Pursuant to Ind. Code § 6-1.1-20.8-2, a person that files a timely personal property return must file the application for Enterprise Zone Business Personal Property Tax Credit (Form EZ-1) between March 1 and May 15 of that year in

order to obtain the credit. A person that obtains a filing extension under Ind. Code § 6-1.1-3-7 (b) for an assessment year must file the application between March 1 and June 14 of that year in order to obtain the credit.

7. The Board has the legal authority to consider a late-filed application for the Enterprise Zone Business Personal Property Tax Credit. *Graybar Electric Co. v. State Board of Tax Commissioners*, 723 N.E. 2d 491 (Ind. Tax 2000). In *Graybar*, the Tax Court references *State Board of Tax Commissioners of Indiana v. New Energy Company of Indiana* (Ind. App. 1992), 585 N.E. 2d 38.
8. In considering a late-filed application, the Board shall consider all of the relevant facts and circumstances, and determine if it is more equitable to grant or to deny the EZ Credit application.
9. The Board has adopted seven (7) factors to guide the exercise of its discretion in determining whether to grant late-filed applications. 50 IAC 10-4-2 (b). The Petitioner was informed of the seven (7) factors and had the opportunity to present evidence on these factors. See finding No. 7 above. The factors and the Petitioner's response to each factor are as follows:
 1. Whether the failure to timely file the application resulted from an act of God, or from the death or serious illness of the person principally responsible for the filing of the deduction application. *(To the extent possible, the taxpayer should provide documentary evidence supporting its contention).*

The Petitioner contends that the Form EZ-1 was filed timely. The Petitioner provided an affidavit of John W. Hartmeyer.

2. Whether the approval of the late-filed application would result in the loss of property revenues to the taxing units affected by the deduction. *(The*

taxpayer should submit a written statement signed by the County Auditor stating whether approval would result in the loss of tax revenues.)

The Petitioner concedes that the approval of the Form EZ-1 for 1998 would result in the loss of personal property tax revenues to the taxing units affected by the credit.

3. Whether a public official gave misleading information to the taxpayer that was the proximate cause of the late-filing, and whether it was reasonable for the taxpayer to rely on that misleading information. *(To the extent possible, the taxpayer should provide documentary evidence supporting its contention).*

No public official gave the taxpayer misleading information. It is the Petitioner's contention that the filing of the Form EZ-1 was not late. The 1998 form was placed in U.S. mail, postage pre-paid first class on May 15, 1998. However, the file stamped date on the Form EZ-1 reflects the date the auditor's office received the Form EZ-1, not the date the form was post-marked. (See attached affidavit of John Hartmeyer (Board Exhibit F)).

4. Whether the lapse between the filing deadline and the date on which the application was actually filed would have prevented local officials from accurately determining the assessed value for budget, rate and levy purposes.

The Petitioner does not concede that there was a lapse between the filing deadline and the date the form was actually filed. The Petitioner contends the EZ-1 was filed on the same day as the deadline, May 15, 1998. However, even if one assumes that the form was filed after the

deadline, the Delaware County Auditor's office file stamped the EZ-1 form on May 18, 1998. Thus, it is highly unlikely that a three (3) calendar day difference from the filing deadline would have prevented local officials from accurately determining the assessed value for budget, rate and levy purposes.

5. Whether there is substantial evidence that local officials support the approval of the late-filed application, even if such approval would result in a loss in tax revenues. *(The taxpayer should provide written documentary evidence including written statements from local officials, including the local Enterprise Zone Board, indicating support for the approval of the application, notwithstanding the fact that the application was filed late.)*

The Petitioner has attached a letter of support of the approval of the Petitioner's EZ-1 Form, even if such approval would result in a loss of tax revenues. Attached to Board Exhibit F is a letter from Ms. Phyllis Amburn, Board President and Mr. Brian Lough, Executive Director of the Muncie Urban Enterprise Association Inc.

6. Whether the late-filing was not due to the taxpayer's negligence.

The Petitioner contends there was no late filing and therefore no negligence. (See attached affidavit of John Hartmeyer (Board Exhibit F)).

7. Any other factor that the Board considers relevant.

The Petitioner would like to draw the Board's attention to *Sugar, Inc. v. State Board of Tax Commissioners*, 683 N.E. 2d 1383 (Ind. Tax Court 1997).

The *Sugars* case involved a determination as to whether a sugar company located within a statutorily designated enterprise zone timely filed an EZ-1 application for the enterprise zone personal property tax credit by placing the application in the United States mail with first class postage before June 14. Mailing by certified or registered mail was not required by statute or regulation. The court held that the testimony of the company's controller that he had deposited the application in the mail was sufficient evidence that the application had been timely mailed even though it was *never* received by the Lake County Auditor.

While the EZ-1 application was never received in the *Sugars* case and the application was ultimately accepted and approved, in the instant case of Al Pete, the application was received, but there is a dispute as to what constitutes the appropriate filing date. The Petitioner contends that the filing date is the date the company placed the application in the U.S. mail, which was May 15, 1998.

The Petitioner notes that since the *Sugars* case there has been no change in the statute or regulations requiring that the EZ-1 application be mailed by either certified or registered mail. The Petitioner's position has been consistent in that they placed the EZ-1 application in the U.S. mail with first class postage on the filing deadline of May 15, 1998. The Petitioner's position is further bolstered by the fact that they also mailed their Form 103 on the same date and that form was filed stamped as May 15, 1998 by the Center Township Assessor's office. Copies of the file stamped forms were enclosed.

Finally, Al Pete has been in the enterprise zone since its inception in 1989. Further, they had timely filed their EZ-1 applications in prior years, such as 1996 and 1997 and those applications were granted.

10. After careful consideration of the facts and circumstances of this situation, the Board hereby approves Al Pete's EZ credit for the 1998 assessment year.

The above stated findings of fact and conclusions of law are issued in conjunction with, and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this _____ day of _____, 2002.

Chairman, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS-

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.